



Canada-United States Law Journal

Volume 23 | Issue

Article 16

January 1997

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Recommended Citation

William C. Graham, *NAFTA Vis a Vis the E.U.--Similarities and Differences and Their Effects on Member Countries*, 23 Can.-U.S. L.J. 123 (1997)

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NAFTA VIS À VIS THE E.U.-SIMILARITIES AND DIFFERENCES AND THEIR EFFECTS ON MEMBER COUNTRIES

*William C. Graham**

I must confess, I am somewhat nervous speaking to this audience of some of my former colleagues and one or two of my former students and certainly many practitioners, who know a great deal more about this subject than I do. So I am going to immediately take the refuge of the scoundrel.

Actually, your speech gave me a thought. Perhaps I could take the ultimate refuge of a person living in a bilingual country and give my talk in French. This is the way we often are able to obfuscate the things we all experience.

But what really makes me nervous, apart from the professional quality of the people in this room, is that there are so many of you. When I give my speeches in the House of Commons these days, there are never as many people present there as are present in this room. That used to embarrass me a great deal until I went down and visited Mr. Gillman, who is Chairman of the Foreign Affairs Committee in Washington. He took me into the House of Representatives, and I realized there were even fewer people in there when they were speaking.

I think there is at least one cultural thing in common between Canadians and Americans, and that is that politicians do not like to listen to one another. I do not know how that is going to play into the Mexican dimension of things of this part of our relationship. We are going to have an election in a few weeks in Canada, so there was much pressure on me not to leave home, to stay there and try to get things cleared up before the election got going.

I suddenly discovered that, again, there is a cultural difference between Canadian politicians and American politicians. In the United States, at least, it seems that the politicians are all so busy. They have very little time to pay attention to anything because they are so busy

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raising money.

In our country, which is a parliamentary democracy, we are all kept busy by the Prime Minister's office to make sure we do not get into trouble. We are given many tasks to do, none of which have any importance or significance. We are kept busy for the sake of being busy, to keep ourselves out of one another's hair.

I have got to challenge one statement made earlier in the day about Canada and the United States being similar in that they are common-law jurisdictions. I want to remind Beatrice of the fact that Canada also has the distinction of being a civil law jurisdiction, thanks to the presence of the Province of Quebec. We believe that this is one of the secret weapons we have got. We are going to use it to be able to ally ourselves with the Mexicans on many things and, thereby, defeat the perfidious aims of the United States in most of these trade agreements.

Finally, let me say that I have prepared a paper which will eventually be distributed, and I want to thank Suh Kim, who is here. She who was really the co-author of it. The serious part of the paper with the assumes and the anecdotes are mine. I really think, perhaps, since this is supposed to be the luncheon speech, I can be more anecdotal than serious. That is perhaps only fair, largely because much of what I have in terms of recent experience that I think I can share with this group, that would be of interest to you, is not the profound legal reflections and the scholarship, which has really come from others who will be speaking, but more just some experience that I have gleaned from my political experience as Chairman of the Committee, which has been largely involved in trade and economic matters.

Obviously, the Arctic study, which the Dean mentioned, is largely circumpolar and political in respect, but it also has a trade dimension to it, in terms of the trade in American products and how it will work. But a great deal of the work our committee has done has been involved with trade matters. We recently did a study of our Special Import Measures Act (SIMA) legislation on anti-dumping and countervailing duty legislation. We did an extensive review of that and reported what changes should be made to that legislation, a report that went into Parliament just at the end of 1996. In terms of legislation, we have dealt with the WTO legislation; we have dealt with the Canada/Chile Free Trade Agreement; and the Canada/Israel Free Trade Agreement in the House recently. So we have had many discussions on these issues, and I have also had the privilege of discussing them quite often with my American colleagues.

One of the privileges of being a member of Parliament is that, if you are a member of the Canada/U.S. Joint Parliamentary Delegation,

you get an opportunity to see your American colleagues on a fairly regular basis. We get together once a year for about a week of intensive meetings. Last year we had great fun. Senator Mikulski arranged for a boat to take us up the west coast to Alaska. We spent five days on a boat with congressmen and senators. It was an opportunity for us and our wives to get to know each other very, very well. We got the opportunity to exchange views on the very issues that we are talking about today. You got a sense of what the people really feel, but maybe I can convey some of that to you.

When Henry originally asked me to talk about this topic, I think he picked it out because he thought that, because I taught European Community Law, it would be a good idea. I realize, of course, since he asked me to do it, I thought it was a good idea the first time, too. But now having done the work, it has struck me that it was a dreadful mistake, because, as it became evident this morning, NAFTA and the European Union really are not very comparable. I mean, they have a comparability in the sense that all human institutions have some similar features to them, and, really, both NAFTA and the European Union are trying to come to grips with the same problems. How do you manage the effects of international economic integration? What institutions do you put in place to manage that integration? So, in that sense, they are grasping at the same problems. You can use the analogy in all sorts of cases. I know that, for example, in the Province of Quebec, there are those separatists who are advocating that if Quebec were to separate from Canada, naturally it would be the European Union that we would turn to as a model. It would free Quebec and the rest of Canada, and ultimately, then, it would have an effect on Americans because this would then factor into NAFTA and all the other relationships that we have on the North American Continent. So the European Union is a very useful model for many things, but when you look at it from our perspective in relation to this group and NAFTA, where do we find serious solutions to our problems?

The differences are just so extraordinary, when you stop to think about it. The European Union is basically a civil law concept. It is a Cartesian thing. General DeGaulle was right when he said they should not let the British in. There is nothing worse than those common-law folks. It is our whole attitude and everything and everybody we talked about. They made it clear that, ever since England bought it, everything has gone wrong. And it is largely because there is a totally different attitude between the civil law and the common-law systems.

There are many ways that I would argue with you that the structures that we have in NAFTA and the structures that are in the European

Union reflect that fundamental difference between a Cartesian/civilian approach to matters, and a common-law approach. It is only one dimension to it or one limb, if I can use Pat's analogy from this morning.

But, there is an aspect of it that is interesting. The European Union grew out of a series of treaties that are called framework treaties. I think it is called CAD. It is not a standard trick in law or an ordinary agreement. It forms the rules under which certain fundamental obligations are created between the states, but it also recognizes that the nature of those rules are so extensive and have such incredibly far-reaching consequences, that they need institutions to apply them and make them work. It has, therefore, created a set of institutions which are legislative in nature; the Council is a legislative institution; the Commission is a supernational executive which applies the rules in ways that are quite extraordinary.

You mentioned the Credite Lyonnaise bank case. I am no longer on the board. Credite Lyonnaise, as you know, is a very important bank. It has gone through a lot of problems. You may have seen recently in the press that the French government owns the Credite Lyonnaise Bank and wants to restructure it. It is a very, very important institution in France, and it is very important that it be restructured. It is having trouble with the European Commission, which is telling the bank that they cannot restructure that way because it violates our subsidy rules. This would be inconceivable, if you can imagine, in the United States or Canada in our relations having anything of that nature. We will come back to that.

The E.U. has a Parliament which addresses issues of democracy and what are called the democratic debts. It has a court with very substantive powers that, in my view, has completely changed the shape, not only of European law, but the European court, which has probably been the primary engine of European integration. I will come back to that, too. It has been a very, very important institution in that system.

Finally, since the European Act of 1988 and the Maastricht Treaty, there has been a substantial transfer of power to Brussels. The consequences are that, in many ways, there is a greater form of economic union within the E.U. than there is within my own country of Canada. Certainly there is the element of free movement of professionals in the European Union. If you have ever tried as a lawyer or an architect or a doctor to move around Canada, you will recognize that, in fact, there are barriers to the free movement of individuals in Canada that do not exist anymore within Europe. And in case you think the United States is any better, look at some of California's more idiosyncratic environmental laws and try to drive a truck full of some lime from Nevada down into California. You will find that it is often harder to get into Califor-

nia than it is to get across the European borders these days. So we all have within our own constitutional frameworks distortions and problems which are being dealt with under our own constitutional arrangements. In Europe, they are dealing with it in what I would call a constitutional way.

And just one final thought about the difference between our own relationships, NAFTA and Europe. The other night I had dinner with John Beck, who is the European representative in Ottawa. You have one in Washington as well, a common ambassador. He is not an ambassador from Europe, he is a representative of the European Commission. If you look at what is going on and you look at the G-7 meetings today, you will see there is a representative there from Europe at the G-7. Why? Because the European nation-states can no longer speak for fifty or sixty percent of the economic matters that are being spoken to at the G-7 meetings. They have to have a representative of Europe; they have to have two of them, in fact. They have got to have the President of Council and they have got to have the President of the Commission in order to function.

So it is an international organization. It has a constitution, and it is very, very different. That is not to say that it does not have its problems; it is becoming enormously complex. I was in Germany recently, I met with the German-European Community's Committee of Parliament, by their House, and they told me that they meet regularly with their Lander representatives. They spend a great deal of time in Brussels, the German Parliamentarians, and the French do, as well; they have to. So you have got the European Parliament; you have got the members of Parliament locally, but in Germany, for example, the German Federal House meets with the Lander representatives, fifty of them on a regular basis. They all go up to Brussels together and they have to work it out that way. I wonder if maybe that is not a crazy thing we could look at ourselves, more cross-border regions. In that case, it might even be useful in Canada, sometimes, if our Parliamentary Committees were to meet in some of our Provincial counterparts in matters where we have cross-border, cross-jurisdictional issues to discuss.

So this is a very different thing. I am not saying it is perfect. Anybody who is watching the British election at the moment knows it has its problems. It arrives out of Europe, so let us not kid ourselves. If you talk to the French about what Denmark does to constantly put a stick in the spokes of things, you will soon get a lively conversation going. And if you talk to even someone as knowledgeable as Mr. Titener, I had dinner with him before Christmas, he was telling me that in many ways he thinks the EMU proposition is a way of dealing with the fact that

the European political institutions are not able to bring the integration process together close enough by themselves. Therefore, they are creating a European monitoring union to force the political thing to come together and gel. I thought that was not a bad analogy.

In many ways, in Canada, I think, if we did not have a common monetary system, we would be less of a unitary state than Europe is today. It is, in fact, the common money that makes Canada in many ways the political dimension of a country. And what the Germans and French are trying to do by creating common money, in a way, is to get over the political problems that are getting in the way of European economic integration.

This is a far cry from what we have here, if we look at NAFTA. It is a loose treaty, not a *traite de côte*. It is a trade law. We do have a commission, which, as we know from Larry this morning, never meets, or I believe it met once in April. It really consists of three trade ministers who are far too busy to get together very often to meet. It has no permanent court. Instead, it has a whole host of *ad hoc* procedures scattered throughout; we have Chapter 20, Chapter 19 issued, and Chapter 11. We have got different ad hockery on the environmental side, a different way to solve the disputes on the labor side agreements, et cetera. It has, as Larry said this morning, no core. There is no core to it.

What we have to decide, of course, is whether this is what we want and whether this corresponds to our needs, and whether this corresponds to our level of economic integration. That is what we are really here to discuss. Then, of course, the problem is, what happens if we were to decide that it does not correspond to our needs or the needs of the institution, or perhaps to us as Canadians. We want to see one thing, the Mexicans want to see another, and the Americans want to see another. Our other problem is the political dimension that has come up here this morning, and that is the fact that with the U.S. Congress, whatever we might think and what we might want and what we are going to get are totally different.

Just look at the debate on the chemical weapons convention that is taking place in Congress today. This is mind-boggling. This was an American conception. They have to deal with the problem of Iraq, the problem of the breakup of Russia, and all these incredibly loathsome weapons of mass destruction with a potential to destroy everybody. It all came together as an American security issue. Now the United States does it once again. It is the history of the United States. It did it with the GATT. It did it with the League of Nations. It will kill it because U.S. senators are saying it is not in the interest of American corpora-

tions to have this intrusive international interference in the way in which they mix their paints.

If we do not do this, we are all going to be in trouble because there are a lot of other little paint plants around the world, out there in Libya and other places, that if somebody is not inspecting them, they can cause a lot of trouble. All Timothy McVeigh had when he drove down to Oklahoma City and blew up the Federal Building there was some fertilizer in the back of a truck that he mixed together in different ways, and that is the nature of the modern system. If we do not have an international system that comes to grips, we are going to be in trouble. But it is pretty clear that our American colleagues are just not at the point where they are willing to accept that. And it may be because the United States is such a world power now, people have not realized that it is vulnerable. This is a fact of life we have to deal with.

We can talk about the WTO case and the Helms-Burton bill. I do not wish to speak ill of Senator Helms, because I am very grateful to him. He has given me a great deal of prominence in my country that I did not have before. Speaking out regularly against it, I achieve all sorts of notoriety, so I am very fond of Senator Helms. I think he should carry on what I consider his reckless morning dialogues with Mr. Castro as to how they can cause as much trouble as they can to keep each other in the news.

But I do want to come back to what I was saying about the institutional structure, because whatever we say about whether we can get something tighter or better, the problem is, will we? And the question is what? If I can speak from a Canadian perspective for a moment, it seems to me what we need as Canadians is a greater degree of legislative and court security than presently is in the system precisely because it has been so effective. I mean, it has been immensely effective.

We can argue to what extent this would have occurred anyway, outside or inside the NAFTA framework, but just look at the numbers. We are talking about a billion dollars a day in two-way trade between Canada and the United States, much of it in service trade; much of it is in goods the Canadians never produced before for export. We are becoming an export country of a very sophisticated manufacturer of products. The recent Canada/Chile Free Trade Agreement was not signed so we could send our traditional exports of wood products and things down to Chile. We are competitors with most of them on those issues. We are sending machinery and other things. This was an important agreement for us because we wanted to break in to much more sophisticated markets. And it was a very important agreement for us because we want to make sure we have investment security, since Canada is becoming a

country which has extensive foreign direct investments itself, as well as being a receiver of foreign direct investment.

So this Canadian, U.S., and Mexican agreement has been important for us. Our Mexican trade has developed, I understand, fifty percent since we signed the agreement. That is up to seven billion dollars a year, which is really significant beside the U.S. trade. But we as a country find this very important. We are very trade-dependent. Thirty-five cents of every dollar out of every Canadian's pocket is directly related to trade. One out of three jobs in Canada is directly related to our trade. So this is very, very important for us. And it is very important, then, that we have in our trading relations with our trading partners institutions which guarantee the access to those markets and guarantee a stability and security in the rules and the application of the way in which it will develop.

So we are going to try and decide how well we are working. It is one of those awful premises, for instance, is the glass half-empty or is the glass half-full? It depends to whom you are talking. It is true that most of our trade is free of problems. But the problems that we do have, do they reflect in such a way as to make you nervous about it?

In my committee, our experience has been extraordinary. What we do is hear all the complaints. The Steel Committee, for example, comes in and complains about those Americans. They say you will not believe what they make you file. Then they say, why not adopt the same thing? Let us have mirror legislation and harass them just as much as they harass us. I say, wait a minute. Does a mouse harass an elephant very successfully? Is this going to work? And so we get into these arguments about what would work against the Americans, and what would be successful? The theory is to build up this enormously harassing machine which we will then offer to dismantle in return for the Americans dismantling theirs. So, of course, we try to talk to our Mexican friends and get them to bring in some things as well. But it is the old question of how do we get the rules, because for us as Canadians it is the debate between the rule diplomacy and power diplomacy. We are going to lose in the power diplomacy, so we want the rule diplomacy. If we look at the European Union, where do we get to have any specific analogies?

But, if you want to look at some of the comparisons between, say, the European Union and NAFTA, look at the expansion problem. It seems to me, one of the problems we have in terms of our arrangement is expansion. I think the NAFTA should expand. I think our bringing Chile in was a good idea. We hope Iraq is kind of a stalking-horse in the United States between those negotiations, although knowledgeable people well know that in the Canada/Chile Free Trade Agreement we

abandoned anti-dumping duties between our two jurisdictions, which clearly would cause considerable sounds of alarm in Washington if that was trying to worm its way into any expansion in NAFTA. But apart from that, I think it is probably an agreement which can largely be extended in the NAFTA consequences, but we have been watching this process now for some years.

Everyone talks about free trade in the Americas by the year 2005. This will be done. Mr. Clinton says that it will be done. You look over the shoulder of the U.S. Congress. I met with Mr. Gillman and his colleagues in Singapore at the WTO meetings. It was very clear that between the Republicans and the Democrats who were there, there was just no agreement whatsoever on the side deals. I think the chance of seeing any agreement with Chile or with NAFTA is extremely remote, to put it in those terms.

The political objections are not just, by the way, at the level of the United States. They are at the level of grass roots politics, the Ross Perot factor, et cetera. I am not saying that we in Canada are any different. I will be fighting in an election over the next few weeks where, with the NDP, this issue will be raised. You have exported jobs. They are already talking in the House about the multilateral investment agreement being cooked up over OECD, like it were some evil conspiracy on behalf of the Liberals to sell the country. We know multilateral investment is about as far away from being anything seriously inhibiting on sovereignty, you can imagine. This is the dialogue of elections and politics.

I was downtown the other day fighting for the preservation of a very important hospital. The present government of Ontario is closing four of the eight hospitals in my district, and it is causing a lot of grief for a lot of people. I was handed a piece of paper at a meeting I went to which told me that the reason why the hospital was being closed was because of NAFTA. Well, of course, then I had to give my speech to keep the hospital open. I had all these people in the back, all these left-wing people booing and hissing that we sold them out. Canada is in NAFTA; NAFTA did this to us. We would not have to close this hospital if we had not sold them down the river to this multilateral globalization scheme, of which NAFTA is one component part. This is a dimension in the politics of all our countries. Expanding NAFTA, for many people in Canada and the United States, is just not odd. What else do we do with this thing we have?

Compared to the European Union, since that is supposed to be a focal point in my talk, it is extraordinary what is happening in terms of expansion. You are talking about fifteen countries, to bring them in, in

the Eastern Hemisphere; Poland, Hungary, the former Soviet Union countries. They are dealing with the incredibly difficult problem of Turkey, which is an extraordinarily complex political issue today, given the Turkish human rights issues and the other problems prevalent there. In fact, there really is no other European country in any way that represents a potential trojan force of the whole Islamic issue coming into the European framework. But they have to deal with it, and it is dealt with in the context of Cyprus and other extraordinary issues. I am not saying they have solved them, but they are working on these issues. They are going to have meetings this summer, where new countries will be admitted into the European Union from Eastern Europe with incredible adjustment consequences, but they seem to be able to do it.

We do not seem to be able to do it, and it has had consequences for us. I think one area which affected us was when the United States signed independently its agreement with the European Union, a framework agreement or agenda, whatever it was called, in Madrid some years ago. We were left out, and we had to go and negotiate our own agreement, although it wound up in the fish war between ourselves and Spain, and a whole host of Canada-European issues. How can you talk about a free trade arrangement of the North Atlantic if the United States is going about it independently; Canada is going about it independently, and Mexico is going about it independently when, meanwhile, we have our NAFTA. What it does to the rules of origin criteria just drives everybody bananas. Technically, what rules of origin are there under these sorts of circumstances? We are going to have enough trouble bringing in Chile for that. That seems to be one area we are looking at to see how we can have at least some coordinating mechanism for the expansion.

Secondly, I think we really do have to look at this question of institutional framework for dispute resolution. I mentioned the House work earlier. I will not go back to that, but the cultural issue is going to give us a great deal of trouble, if not serious problems, to discuss in the next few years. These are political issues. When we talk culture in Canada, we are not talking business and Disney World the way people are in the United States. When I talk culture and the preservation of Canadian culture, I am talking about whether I can get gun control into my country, and whether or not I can keep a health care system that is different from the United States. That is the importance of a cultural dimension in our country.

If we do not have cultural institutions that allow us to talk to each other and preserve that communication, we are not going to exist. We are not going to have those. Those are very important to us. We are not

going to have a NAFTA. We are not going to have an agreement with the United States if that has to go, because we will not give it up. These are very, very important, and they are going to cause real flash points because the cultural community of the United States is on a bandwagon to dismantle these because they are worried about what it means in terms of their relationship to Europe.

I talked to the Chairman of the Cultural Committee in the European Parliament about this, and I have talked to Mr. Viskà Vistang about it. This is a big issue. It is going to move right out of the WTO agenda and right through a lot of issues. It is going to be very important to hear. The institutional framework for managing that stuff is going to be very important.

Finally, we have the issue of the trade remedies. The AD obviously has disappeared in Europe. Countervailing is being totally replaced in Europe by a different system, a European system of management. How well is the panel system working is the question we have asked. That has been a subject of very interesting testimony before our committee recently. I has gotten mixed reviews. There are those who say the challenges have worked well. And, in fact, it has worked so well that there are fewer challenges now, and that is partly because it has put a discipline, particularly on the Canadian and American internal systems, in such a way that we get fewer challenges. So this is a good thing. This is the half-full glass, if you want to look at it that way, so it is successful. I think the Mexican experience has not reached that far because we have not had the same experience in Mexico.

Some people have suggested to us that we as Canadian politicians should consider the WTO rules today because they are more favorable to us. We should ignore NAFTA panels. We should go to the WTO because it is a multilateral framework and because there is greater certainty there, and there is a potential of the appeals court and the way it works. We should be looking at that.

Can you imagine in the European Union if somebody said we should not go to the European court, but we should go to the WTO? If we are talking in the context of a NAFTA-European Union comparison, it would just be unthinkable. We do have to look at the possibility of a permanent court. It has enormous advantages, whether trilingual, Spanish, English, French, quadrilingual — well, trilingual would be French, English, and Spanish, it would be quadricultural, if I may say that.

Canadians have a civil law. Provincially, we could deal with a lot of Beatrice's problems. We could put some formalism in there and have some nice papers to stamp, get rid of these different tribunals that are going to be skulking around Chapter 20, 19, and 11 side agreements, all

this sort of ad hockery, and bring it into one. I do not think we will see it for the same reason that we did not see our CBABA proposals suggested. It does not sink like a stone, because people would not worry if it were too successful. A success would threaten the group who is very nervous about the sovereignty issue.

I agree with Beatrice also in that, if anybody is going to pay for it, of course we know exactly who will do it, or at least who will pay for the larger share. We may need it more, but you guys will use it more. I think this is something that requires a serious thought. And I do not have the time to discuss this with you this morning. But have a look at it, if you are interested in the subject. Take a look at what the European Community has done. It is extraordinary what happened in the thirty-odd years of the European Union.

It started off with a case like *Kosta*, where it provided a concept of directly applicable law, which in itself is an extraordinary thing. We might have a look at ourselves as another European example. In the *Kosta* case, there are two concepts which are fundamental to European law, that of privacy and direct applicability. Direct applicability means any citizen of any country can go and take a European norm before its domestic court and argue it and have the court consider it the application of a local law. The privacy rule means that, where the jurisdictional element is correct, the European norm will trump the local and consistent law. These are the two basic concepts of European law.

The advantage of it is, without getting into privacy, because I realize we are into serious problems there in our context of NAFTA. Even if we could get into the first idea that the NAFTA rules would be directly applicable in our courts, it is a far more democratic concept than always being dependent on a Chapter 20 panel where I have to go cap in hand to the Canadian government and get them to challenge the American government. You bring it into your federal court. We want to challenge one of these things with something like when I drive my truck across the border and they have got a problem with the labeling. Maybe you could just challenge that yourself, right in your own court. Or, you could challenge it in the U.S. court. Go get a mandamus against the customs inspector. Maybe the Mexicans can just go get a mandamus by an American authority against their own people to apply the NAFTA rule. Why not, rather than having to go through this traditional state-by-state thing.

We are talking about countries with a billion dollars a day and two-way trade and hundreds of millions of dollars of cross-border investments and intra-firm trade. This is enormous. Some people say that our intra-firm trade is at a level which makes us more economically

integrated than Europe. Why would we not have some system at least where we can get direct access to legal ruling bodies by the citizens involved to make rules on these subjects rather than having to go back to the traditional rules of international law and state-to-state adjudication.

I will just leave you with that last thought, then, that maybe there is something in the European Union after all that may not be the direct applicability of many of their institutions, because the level of economic integration and political integration is significantly different than ours and it probably calls for very different solutions, but there are germs of ideas there that are worthy of looking at. One of them could well be to just persuade our courts. There is room in the United States for it. International lawyers here well know it, the *Fuji* case, for a recognition of applicability of international law in domestic law. In Canada it is more complicated, because we have the British constitutional system. But there are possibilities now arising out of foreign cases and some other recent cases which show that our courts are more receptive to the need to apply international rules because they recognize that the international economic integration that we presently live in affects the development of law, as well as the development of politics and economics. Judges are capable and able to deal with these issues. They should be encouraged to do so. You can let us politicians then resolve the serious problems in the country, and let us politicians go on with this, having the fun of getting reelected and just blithering on about our problems.

